NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA Plaintiff – Appellee, vs. WADE VINCENT SHANG, Defendant – Appellant.	NO. 06-15354 D.C. CV 05-2106WHA CR 02-0239 WHA MEMORANDUM* Filed Jan. 29, 2007

Appeal from the United States District Court
For the Northern District of California
William H. Alsup, District Judge, Presiding

Submitted January 12, 2007**
San Francisco, California

Before: NOONAN, TASHIMA, and CALLAHAN, Circuit Judges.

Wade Vincent Shang appeals from the district court's denial of his motion to vacate, correct, or set aside his sentence under 28 U.S.C. Section 2255.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R.36-3.

**This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Shang argues that his Sixth Amendment rights were violated by the ineffective assistance of his trial counsel. Shang also moves to expand the certificate of appealability ("COA") to encompass his argument that his appellate counsel was constitutionally ineffective. We have jurisdiction over Shang's appeal pursuant to 28 U.S.C. sections 1291 and 2253. We affirm, and we deny Shang's request to expand the COA. 1

We review the district court's denial of a section 2255 motion de novo, while reviewing the district court's factual findings for clear error. United States v. Alaimalo, 313 F.3d 1188, 1191 (9th Cir. 2002). A district court's determination as to whether counsel was constitutionally ineffective is also reviewed novo. Id.

In 2003, Shang was tried on five counts of attempted income tax evasion. He was convicted of three counts and acquitted of two; another count was overturned on appeal. Shang now contends that his trial attorney based his defense on a misunderstanding of controlling law concerning tax evasion charges. According to Shang, his counsel relied on a "Merritt defense" derived from Merritt v. United States, 327 F.2d 820 (5th Cir. 1964), erroneously believing that a generalized showing that the government has failed to conduct a sufficiently thorough investigation will invalidate a multi-year indictment.

We reject Shang's ineffectiveness claim because Shang has failed to show that his trial counsel's

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(1) Because the parties are familiar with it, we do not recite the procedural and factual background, except as necessary to understand our disposition.

performance "fell below an objective standard of reasonableness" Strickland v. Washington, 466 U.S. 668, 688 (1984). First, any reliance by counsel on Merritt was not per se unreasonable, because Merritt does not , contrary to Shang's assertion, conflict with Ninth Circuit law. Second, in his motion for acquittal, Shang's counsel's use of Merritt was reasonable and did not evidence a misunderstanding of Ninth Circuit law. Third, at trial, Shang's counsel pursued a sound strategy of showing specific errors in the government's calculations for particular tax years, and did not simply present a generalized defense to the indictment.

We also deny Shang's motion to expand the COA. Shang's appellate counsel filed a timely appeal and made appropriate legal arguments for reversing the district court's denial of the motion for acquittal. The attorney's choices regarding how to make use of Merritt were also highly reasonable. Shang has not made a substantial showing that he was denied his Sixth Amendment right to effective assistance of counsel on appeal; thus, 28 U.S.C. Section 2253(c)(2) bars us from expanding the COA.

AFFIRMED; motion to expand COA DENIED.

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA	)	NO. CR 02-00239WHA
Plaintiff,	)	
v.	)	**ORDER DENYING MOTION TO VACATE, CORRECT OR SET ASIDE THE SENTENCE**
WADE VINCENT SHANG,	)	
Defendant.	)	Filed Jan. 9. 2006

INTRODUCTION

Wade Vincent Shang has moved to have his sentence for tax evasion for 1996 and 1998 vacated or set aside on grounds that his attorneys rendered unconstitutionally poor representation. The Court agreed to address three issues: (1) whether trial counsel relied on *Merritt v. United States*, 327 F.2d 820 (5th Cir. 1964), (2) whether any such reliance was ineffective assistance of trial counsel and (3) whether appellate counsel's failure to argue *Merritt* was ineffective (Order (1) In Resp. to Pet'r's req. For Recons. & (2) To Show Cause at 2, Aug. 25, 2005). Trial counsel relied on *Merritt* but such reliance was not ineffective. Appellate counsel reasonably decided not to argue *Merritt* but instead to address it in briefs.
The motion is Denied. 1

(1) Mr. Shang, a lawyer suspended from practicing law, made his motion pro se. His traverse was ,however, filed by a fully licensed attorney.

STATEMENT

Mr. Shang, an attorney and certified public accountant, was convicted of three tax-evasion counts, one each for 1996 , 1998 and 1999. Prosecutors employed the net-worth method, a method of determining income by comparing a defendant's net worth at the beginning of the year with that at the end of the year, then adjusting for any nontaxable items. All increases in net worth unattributable to tax-free sources are treated as income. Mr. Shang was acquitted of counts covering 1995 and 1997. His conviction for 1999 was overturned on appeal. His convictions for 1996 and 1998 were affirmed. *United States v. Shang*, 114 Fed.Appx. 813, 814 (9th Cir. 2005). He was re-sentenced to a somewhat lower sentence in light of the 1999 result. He is now serving that sentence.

Petitioner alleges that his trial counsel's reliance on *Merritt* was reflected in counsel's purported failure to introduce evidence or elicit testimony to show which assets and liabilities were omitted from the government's net-worth calculations, and how those omissions quantitatively affected the calculation of unreported income for 1996 and 1998.

Petitioner claims that trial counsel analogized putting on a *Merritt* to putting on a defense against drunken driving charges by showing that the government had not proven that the defendant even drove the car. "He indicated to me in essence that when the Government knows of assets and liabilities and omits them without justification, it requires acquittal on that basis alone" (Shang Decl. Paragraph 9).

After the verdict, petitioner moved for a judgment of acquittal. In that motion, he argued that the government had failed to establish a tax evasion because it did not investigate thoroughly Mr. Shang's net wroth in the years in question. In particular, he alleged that the government had failed to exclude the possibility that increases in net

worth were attributable to omitted assets or liabilities. Defense counsel cited *Merritt*, claiming that it had "facts remarkably similar to, but not as egregious as , those in this case." Defense counsel stated that, in *Merritt*, a special agent acknowledged on cross-examination that he "had missed unidentified assets." Defense counsel also quoted the following sentence from *Merritt*: "We conclude that the burden was on the government to identify these assets and to included them in the net worth schedule." Trial counsel later wrote that "[h]ere[,] as in *Merritt*, the government clearly failed to conduct a thorough investigation of Defendant's assets and liabilities as to each relevant date in the prosecution years. The Government, thus, as a matter of law, did not establish with reasonable certainty Defendant's assets and liabilities, and consequently did not meet it burden of proving that the apparent increase in Defendant's net worth was attributable to unreported income. ... Accordingly, the Government should not have been allowed to rely upon the net worth method of proof, and Defendant's Motion... should... be granted" (Br. 1-2, 13-14, Motion for Acquittal). In the defense reply brief, *Merritt* was cited merely to note that the government had not addressed the decision in its opposition (Reply 3).

The Court denied the motion. It noted that *Merritt* involved the exclusion from net-worth figures of assets that the government knew about from its investigation. The Court stated that , in the instant case, by contrast, the omitted assets were *not* known to the government until the defense introduced evidence of them at trial (Order Denying Post-Trial Motions at 3, January 15, 2004)

ANALYSIS

Upon motion, a federal court may vacate or set aside a sentence it imposed if the sentence was not authorized by law and if there was such a denial or infringement of the

accused's rights as to make the judgment infirm. 28 U.S.C. 2255 para. 2. The petitioner has the burden of showing the error. *United States v. Frady*, 456 U.S., 152, 170 (1982). The Ninth Circuit has not set forth the level of proof required to obtain such relief. Every other circuit that has articulated a standard held that it was preponderance of the evidence. See *United States v. DiCarlo*, 575 F.2d 952, 954 (1st Cir. 1978); *Triana v. United States*, 205 F.3d 36, 40 (2d Cir. 2000); *Miller v. United States*, 261 F.2d 546,, 547 (4th Cir. 1958); *Wright v. United States*, 624 F.2d 557, 558 (5th Cir. 1980); *Hearn v. United States*, 194 F.2d 647, 649 (7th Cir. 1952); *Davis v. United States*, 226 F.2d 834, 836 (8th Cir. 1955); *Crail v. United States*, 430 F.2d 459, 460 (10th Cir. 1970); *Battle v. United States*, 419 F.3d 1292, 1298 (11th Cir. 2005); *Grennett v. United States*, 403 F.2d 928, 930 (D.C. Cir. 1968); see also *Johnson v. Zerbst*, 304 U.S. 458, 468-69 (1938)(holding , pre-Section 2255, that preponderance of the evidence is standard in habeas cases arising from federal judgments). In cases alleging ineffective assistance of counsel, however, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

1. Merritt

The first task in determining whether trial counsel relied on *Merritt* is to understand the decision. In *Merritt*, the appellant had been convicted, upon proof by the net-worth method, of evading income taxes for two years. At trial, a government agent who determined the alleged net-worth amounts testified that the prosecution had not taken into account all of the defendant's assets that it knew about. Neither counsel asked what those assets were. The firth Circuit held that the government had the burden of identifying those assets and justifying its failure to include them in the net-worth computation. Having failed to do so, the prosecution had not

established a reasonably certain open net worth, the court of appeals held that to make out a reasonably certain net worth the government must list or account for all assets of the defendant of which the government was aware. The Fifth Circuit then reversed the judgment of conviction. *Merritt*, 327 F.2d at 820-23.

2. Reliance on Merritt.

There are two ways in which the trial counsel's performance must be examined to determine if he relied upon *Merritt*. First, did he cite to *Merritt* or otherwise refer to it explicitly in any of this work? Second, did he engage in tactics that were consistent with reliance upon *Merritt*'s holding or dicta.

As to the initial question, Mr. Shang points to two instances when trial counsel relied on *Merritt*. First, counsel described the defense to Mr. Shang and , by reference to it, "indicated" to Mr. Shang that the government's unjustified omission of known assets and liabilities would require acquittal.2 Second, counsel relied on *Merritt* in his post-trial motion for acquittal, using it as an example of a decision in which a verdict has been overturned, purportedly because the government had failed to conduct a thorough investigation.

Petitioner also claims to present indirect proof of counsel's reliance on *Merritt*. He suggests that counsel

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2 Only a generous construction of Mr. Shang's declaration permits this understanding. In full, Mr. Shang stated: "Trial counsel stated to me that the *Merritt* analysis was analogous to the Government charging a person for drunk driving but failing to include testimony about driving the car. He indicated to me in essence that when the Government knows of assets and liabilities and omits them without justification, it requires acquittal on that basis alone" (Shang Decl. Paragraph 9).

elicited testimony showing omissions but proved neither what *specifically* was missing nor how those items would affect the margin of error in the government net-worth calculations. Petitioner claims that such specific evidence would have shown the government's net-worth calculations to be far off the mark, requiring reasonable doubt and , consequently, acquittal.

3. Trial Counsel's Reliance On Merritt.

Petitioner claims that this trial counsel's reliance on *Merritt* was ineffective assistance of counsel, denying the right to representation at trial. To prove ineffective assistance of counsel, petitioner must show (1) that counsel's performance was so deficient that it "fell below an objective standard of reasonableness," and (2) that "the deficient performance prejudiced the defense," such that the defendant did not have a fair and reliable trial. *Strickland* , 466 U.S. at 686-89.

Counsel reasonably relied upon *Merritt* in the motion for acquittal. There was enough similarity between the cases that a competent attorney might have expected that citing *Merritt* would help persuade the Court to acquit. Counsel implicitly made the colorable argument that the Court should extend *Merritt* to cases in which the government omitted assets despite not knowing about them before trial.

Furthermore, counsel cited *Merritt* mainly for the proposition that flawed investigations warrant acquittal – a notion that was consistent with controlling Ninth Circuit decisions. See, e.g., *United States v. Hall*, 650 F.2d 994, 999 (9th Cir. 1981). Finally, trial counsel in no way put all of his eggs in the *Merritt* Basket. He relied heavily on *Holland v. United States*, 348 U.S. 121 (1954), The Department of Justice Criminal Tax Manual and *Hall* (see Br. 2-5 & Reply 2,3 and 5, Motion for Acquittal).

Although petitioner argues that *Merritt* was the "entire basis for defense counsel's strategy at trial," there is, at

best, weak evidence that counsel relied on *Merritt* aside from the motion for acquittal. A *Merritt* defense is one in which defense counsel (1) seeks to show that the government knew about assets before trial, (2) did not include them in its net-worth computation, (3) has no justification for the omission and (4) does not seek to show what those specific assets were or their value. In essence, it is to rely on the government's failure to identify at trial all assets of which it knows, leaving open the possibility that those assets were valuable enough to erase all unpaid tax liability. Defense counsel clearly did not pursue such a strategy here. He repeatedly elicited testimony and introduced evidence to show which assets the government had failed to consider and their value. He showed that the government investigation failed to turn up two Bank of America accounts worth roughly $61,000. By incorporating these funds into the net-worth calculation and excluding the value of attorney-client trust accounts, Mr. Shang showed that he incurred no tax liability for 1995 and 1997, and was acquitted as to those years. Evidence was also introduced that two companies that extended Mr. Shang credit could not be located and that the government consequently did not consider those liabilities. Another line of credit was revealed that reduced the unreported income from 1999 from $61,000 to $27,000, a discrepancy that helped persuade the Ninth circuit to overturn the conviction for 1999 (Order Denying Post-Trial Motions at 2-4). *See* Shang, 114 Fed.Appx. at 814. This history disproves Mr. Shang's contention that his trial counsel, by relying on *Merritt*, "did not undertake to show, by cross-examination or affirmative proof[,] the specific omitted items or the impact on taxes of the omitted items, as to each individual indictment year" (Br. 2).

Throughout his briefs, petitioner repeatedly misstates the holding of *Merritt*. For example, he claims that there is a theory, "valid only under *Merritt*, that eliciting admissions from the prosecution's witnesses that they had

missed some assets and liabilities [is] sufficient to require an acquittal on all charges." In fact, *Merritt* did not involve proving that the prosecution "missed" assets and liabilities. It instead addressed situations when the government *did not miss* assets yet failed to include them in its calculations and did not justify the omission.

Mr. Shang' motion also alleges that his trial counsel elicited testimony that the agent knew about his office in San Antonio, Texas, and that he owned a car there. He does not, however, demonstrate that trial counsel ever sought to elicit testimony that the value of those assets was unjustifiably excluded from the government's net-worth computation, which would be an essential part of a *Merritt* defense. He claims that counsel's reliance on *Merritt* was also shown by his cross-examination of a government agent, revealing that the investigation missed some liabilities and that it possibly was not thorough as to assets (Br. 3-4). Such testimony is irrelevant to a *Merritt* defense. A *Merritt* defense does not concern the thoroughness of the investigation but rather whether the government excluded assets of which it knew – and, therefore , *had investigated* – from the net-worth figures.

Throughout his brief, petitioner states that , rather than rely on *Merritt*, trial counsel should have relied on *United States v. Keller*, 523 F.2d 1009 (9th Cir. 1975), as if the two decisions contradicted one other. They do not. In *Keller*, the Ninth Circuit overturned a guilty verdict because the government had failed to conduct a reasonably through investigation. The government thus possibly missed assets that would have entirely wiped out tax liability for one year. The court also upheld guilty verdicts for two other years on the grounds that, even if the appellants could establish the alleged errors, the resulting margin of error would be no more than one-tenth the claimed understatement in income. Over $20,000 in undisclosed income would remain for each year. Such a small margin of error was not sufficient to

warrant reversal. *Id.* at 1011-12. *Merritt* involved no assertions of inadequate investigation but instead proof that the government knew about assets yet failed to incorporate them into its net-worth calculations. *Keller* also held that any error must be greater than one-tenth the alleged understatement to overturn a guilty verdict. That holding is distinct from the rule petitioner attributers to *Keller*, that no verdict can be overturned unless the margin of error is proven. *Keller* said nothing about assets knowingly omitted by the government the value of which was unknown to the court. *Keller* therefore did not contradict *Merritt*. The decisions each dealt with distinct – but not mutually exclusive – failures to prove guilt. Whether or not trial counsel relied on *Keller* is therefore irrelevant to whether he relied on *Merritt*.

If trial counsel failed to introduce evidence of specific, unjustified omissions for 1996 and 1998, the best explanation is that the attorney never knew about them. Failure to know about or learn about assets is not a *Merritt* strategy. Here, it apparently was due to Mr. Shang's failure to tell his own counsel about the items (see Shang Decl. Paragraph 11 ("My trial attorney and I did not discuss these issues [of a potential tax write-off and of checks for which the government purportedly had not accounted properly]."). Counsel would have great difficulty turning up confidential evidence that his client kept secret. Simply pointing to the evidence now, without a good reason to blame counsel for not introducing it at trial, does nothing to prove that counsel ineffectively relied on *Merritt*.

Mr. Shang has not demonstrated that trial counsel relied on *Merritt*, other than in the motion for acquittal. In that motion, his use of *Merritt* was reasonable. The Court therefore finds that reliance on *Merritt* did not constitute ineffective assistance of counsel.

3. Appellate Counsel's Reliance on *Merritt*.

Appellate counsel can also render constitutionally deficient representation requiring reversal. *McCoy v. Ct. App. of Wis., Dist. 1*, 486 U.S. 429, 436 (1988). Petitioner alleges that his appellate counsel provided ineffective assistance of counsel by not arguing *Merritt* before the Ninth Circuit. Appellate counsel, Farley Katz, is a partner in the same law firm as trial counsel Charles Muller. Strasburger, Who we are, San Antonio Office,at http://www.strasburger.com/directory/dir_sanantonio.htm (last viewed Dec. 9, 2006). At argument, appellate counsel instead described holdings from *Holland* and *Hall* and applied them to the facts of the instant case, although he never mentioned the decisions by name. See *Audio Files*, Ninth Circuit arguments, at www.ca9.uscourts.gov (last reviewed Jan. 6, 2006). The appellate counsel did, however, mention *Merritt* in briefs (see Brief for the Appellant at 33, *Shang*, 114 Fed.Appx. 813 (9th Cir. 2005)(No. 04-10063); Br., Mot. To Vacate, Set Aside or Correct the Sentence, at 6 (acknowledging use of *Merritt* in petition for rehearing)). It was not unreasonable for Mr. Shang's counsel to restrict his discussion of *Merritt* to the briefs. Counsel has a limited period of time to argue. Some things must be left out. In addition, what counsel states at argument is often controlled by the questions posed by the judges. Appellate counsel here was reasonable to leave out mention of *Merritt*, which is both not controlling authority in the Ninth Circuit and not directly on point factually. The appellate counsel provided effective assistance of counsel.

CONCLUSION

Petitioner has not sustained his burden of demonstrating, by a preponderance of the evidence, that he was deprived of his Sixth Amendment right to effective assistance of counsel insofar as his attorneys relied upon

Merritt at trial but did not argue it before the Ninth Circuit. His motion therefore is **DENIED**. Because there are not material factual disputes, petitioner's request for a hearing also is **DENIED**.

IT IS SO ORDERED.

DATED: JANUARY 9, 2006

/s/ William Alsup
William Alsup
United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA Plaintiff – Appellee, vs. WADE VINCENT SHANG, Defendant – Appellant.	NO. 04-10063 D.C. CR 02-00239WHA MEMORANDUM

The petition for rehearing is denied.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA	NO. 04-10063
Plaintiff – Appellee,	D.C. CR 02-00239WHA
vs.	MEMORANDUM*
WADE VINCENT SHANG,	
Defendant – Appellant.	Filed Nov. 22 2004

Appeal from the United States District Court
For the Northern District of California
William H. Alsup, District Judge, Presiding

Argued and Submitted November 4, 2004
San Francisco, California

Before: CANBY, RYMER, and HAWKINS, Circuit Judges.

In this tax evasion case, the government chose to employ the net worth method, a circumstantial method of proof requiring "the exercise of great care and restraint," *Holland v. United States*, 348 U.S. 121, 129 (1954), and as to which the government "assumes a

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3

special responsibility of thoroughness and particularity in its investigation," *United States v. Hall*, 650 F.2d 994, 999 (9th Cir. 1981).

Because the government proved a reasonably certain opening net worth and a sufficiently thorough investigation for tax years 1996 and 1998, we affirm the denial of Shang's motion for acquittal as to these two counts.

However, we reverse the conviction on the 1999 count because the government's efforts resulted in a net worth calculation lacking the required "thoroughness and particularity." *Hall*, 650 F.2d at 999. The government admitted that its net-worth calculation for tax year 1999 was off by some $47,000 in two respects: (1) making a "substantial understatement" of Shang's 1999 tax liabilities by failing to discover a $34,000 credit line; and (2) missing seven checks totaling approximately $13,000 that did not clear before the end of 1999, even though they should have been counted to adjust the year-end bank balance. Compare *United States v. Keller*, 523 F.2d 1009, 1012 (9th Cir. 1975), where we affirmed a conviction with a 10% computational error. Here, the computational error is 75% or 40% depending on whether Shang's client trust accounts are included. While the government need not prove its calculation to a "mathematical certainty," these errors stray far from that level of accuracy into the realm of downright inaccuracy.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR RESENTENCING.

RYMER, Circuit Judge, concurring in part and dissenting in part:

I agree that Shang's motion for acquittal was properly denied for tax years 1996 and 1998, but disagree that the government's efforts resulted in a net worth calculation lacking the required "thoroughness and particularity" for 1999 under *United States v. Hall*, 650 F.2d 994, 999 (9th Cir. 1981)(per curiam). Shang offered no leads and no reasonable explanation that the government failed to pursue which would establish his

innocence. See *Holland v. United States*, 348 U.S. 121, 135-136 (observing that evidence may be insufficient to go to the jury when "the Government does not track down relevant leads furnished by the taxpayer – leads reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence."); *United States vs. Greene*, 698 F.2d 1364, 1371 (9th Cir. 1983)(same).

United States v. Keller, 523 F.3d 1009 (9th Cir. 1975), is inapposite because there (as in Hall), the taxpayer did offer leads that the government did fail to pursue. Certainly here, the $34,000 line of credit problem cannot be laid at the government's doorstep; the government "failed to discover" the increase because Shang's mortgage company failed to provide complete records in response to a subpoena. Even if the government should not have "missed" the seven checks that didn't clear before year end, that error neither undermines the thoroughness of its overall investigation nor casts any doubt on Shang's innocence. In total the checks amounted to only $13,052, well within the margin of error approved in *Keller*, 523 F.2d at 1012 (affirming conviction with ten percent computational error). In any event, at the end of the day there was still a substantial under-reporting of income, by anywhere from $20,000 (construing possible errors entirely in Shang's favor) to $47,000 (construing errors in the light most favorable to the government). As *Hall* itself states, when "it is shown arithmetically that even under the [taxpayers'] version there would be a substantial amount of unreported income, the error would be inconsequential and the Government relieved of the need to pursue the matter." 650 F.2d at 1000. I would, therefore, affirm across the board.

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA Plaintiff, vs. WADE VINCENT SHANG, Defendant.	)	NO. CR 02-0239WHA ORDER DENYING POST TRIAL MOTIONS Filed Jan. 22 2004

STATEMENT

Wade Vincent Shang was charged in this case with five separate counts of income-tax evasion governing the 1995 through 1999 tax years. A jury found him guilty of all charges except those related to the 1995 and 1997 tax years. Shang now seeks acquittal on all counts. His primary contention is that the government failed to conduct a thorough investigation into additional assets and liabilities – items that Shang argues were improperly excluded from the calculation of his opening net income under the net-worth method of proof. Shang also moves for a new trial alleging a number of prejudicial errors. This order holds that the government's investigation was sufficiently thorough and that there was sufficient evidence to convict. There is no occasion for a new trial.

ANALYSIS

The government in the instant case relied upon the

net-worth method of proof to establish that Shang had under-reported his taxable income for five consecutive years beginning in 1995. Under this method of proof, the government first establishes the net worth (assets less liabilities) of the taxpayer at the beginning and end of each tax period in question. If the closing net-worth figures is greater, the difference is the increase in the taxpayer's net worth during the given period. The taxpayer's non-deductible expenditures are estimated and added to this figure and all known nontaxable income is subtracted. The resulting figures is compared to the reported taxable income on the taxpayer's return. If the figures is greater than that reported by the taxpayer, the government claims the difference is unreported income. See *United States v. Greene*, 698 F.2d 1364, 1366 n. 1 (9th Cir. 1983).

To meet its burden under the net-worth method, the government must : (1) accurately establish the taxpayer's opening net worth for each year of prosecution; (2) identify a likely source of taxable income from which it may be inferred that the taxpayer's increase in net worth arose; and (3) establish that it conducted a reasonable investigation of any leads that suggest the taxpayer properly reported his income. *See Holland v. United States*, 348 U.S. 121, 132, 135-37 (1954).

In this case, Shang argues the government failed to establish his opening net worth with reasonable certainty. Shang takes issue with the government's investigation. The government missed two bank accounts worth roughly $61,000. The investigation also failed to uncover additional credit-card balances, alleged loans or advances from Shang (a personal-injury attorney) to his clients, medical bills and other medical-related costs like hospital charges and ambulance fees, and a draw on a line of credit existing on a mortgage. Although Shang does not specify which tax years were affected by the alleged omissions, the overall result was an incomplete picture of his net worth, or so Shang contends.

The inquiry boils down to whether there was sufficient evidence for the jury to conclude that the

government had met its burden of investigating reasonable leads to establish Shang's net worth at the outset of each tax year of conviction. The government has a duty to effectively negate a taxpayer's reasonable explanations inconsistent with guilt. That duty is limited to the investigation of leads reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence. *Id.* at 135-36. The jury's verdict should be upheld if, viewing the evidence in the light most favorable to the government, there is relevant evidence from which the jury could reasonably have found guilt beyond a reasonable doubt. *United States v. Gardner*, 611 F.2d 770, 775 (9th Cir. 1980).

This order holds that the evidence was sufficient for the jury to conclude that the government had conducted a reasonable investigation to support the counts of conviction. The Internal Revenue Service tracked down fourteen bank accounts. It missed two accounts at Bank of America, which together had a balance of approximately $61,000 relevant to year 1995. One of the accounts was held at a branch in Dallas, Texas, and the other at a branch in Torrance, California (Tr. 796, 799). This omission, however, was not the fault of the government. Notwithstanding a subpoena, the Bank of America failed to turn over the records related to these two particular accounts. Shang brought these accounts to the attention of the jury at trial, and he did so effectively, By incorporating these funds into the net-worth computation *and* excluding Shang's attorney-client trust accounts, Shang incurred no tax liability for the years 1995 and 1997 (Tr. 746, 806-09). As stated, the jury acquitted Shang of income-tax evasion for those two years.

In this way, Shang's reliance on *Merritt v. United States*, 327 F.2d 820 (5th Cir. 1964), is to no avail. That case involved a clear omission of assets *known* to the investigation agent from the defendant's opening net-worth computation. The government in the present case, however, was unaware of the two other accounts at the Bank of America until Shang disclosed them at trial. Unlike the agent in Merritt, the investigating agent here did not testify that the government knew of

the two accounts at issue and purposefully excluded them from the opening net-worth calculation.

Shang makes much of the trial testimony of the investigating case agent who stated in cross-examination that some liabilities had not been accounted for and that it was "possible" that she had not conducted a through investigation of Shang's assets (Tr. 593). Shang views this testimony as a concession by the government that its investigation was not thorough. This order disagrees. There was sufficient evidence on this record for the jury to conclude that the government had conducted a thorough investigation of Shang's assets and liabilities and established his net worth with reasonable certainty on the counts of conviction.

The IRS agent testified, for example, that she reviewed Shang's loan applications which disclosed various credit-card accounts. She subpoenaed all of the credit-card companies listed thereon except the two for which addresses could not be located (Tr. 599). The agent further testified that she examined bank records and interviewed Shang's clients to verify whether loans and advances had been made as alleged. Only a few clients claimed to have received loans, which would have taken the form of accounts receivable and purportedly increased net worth. There were, however, no bank records to verify that the payments were made as loans (Tr. 570-71). Moreover, the alleged liability for medical obligations was not supported by any documentation such as bills or doctors' reports. As to the charge against the line of credit that the government admittedly did not locate, its failure did not eliminate Shang's unreported income for 1999 but only reduced it. For that year, the government had calculated unreported income of approximately $61,000 (Tr. 741). Taking into account the omitted draw, what remained was unreported income of $27,000, which was still fully subject to tax (Tr. 808). For these reasons, Shang's motion for judgment of acquittal is **DENIED**.

* * *

Shang also seeks a new trial alleging various prejudicial trial errors. This order holds that there is no basis for a new trial. Shang contends, for instance, that he was denied a fair trial because the prosecution did not establish a proper foundation for the admission of its net-worth testimony and computations.1

The challenge is that the Court failed in its "gate-keeping" function to hold the government to its burden of proving a reasonably thorough investigation to convict. Shang's argument is without merit. The reasons supporting the denial of Shang's motion for judgment of acquittal also support the denial of the instant motion for new trial. The government met its burden and the case properly went to the jury.

Shang further argues that he was denied a fair trial because the Court modified a part of his proposed net-worth instruction, which stated that a "thorough investigation" by the government was "crucial" to establishing Shang's opening net worth with reasonable certainty. The Court , however, has broad discretion in formulating jury instructions. *United States v. Patel*, 762 F2d. 784, 790 (9th Cir. 1985)(trial judge has substantial latitude in tailoring instructions so long as they fairly and adequately cover the issues presented). Here, the Court's instruction provided in relevant part that:

> When choosing to proceed against a defendant using the net worth method of proof, the government assumes a responsibility of thoroughness in its investigation. In this case the government seeks to prove that the defendant did not have any substantial assets

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1 Shang first raised the argument at the close of the government's case at trial. At that time, Shang moved to strike the government's net-worth computations and for judgment of acquittal under Rule 29 (Tr. 817-19).

> at the beginning of each year other than those disclosed as a result of the government's investigation involving tracing the defendant's financial and income tax return filing history. In determining whether or not the alleged opening net worth is reasonably accurate, you may consider whether the government has tracked down all reasonable leads or explanations discovered by the government or suggested to the government by the defendant during the government's investigation which tend to establish the defendant's innocence.
>
> If you were satisfied that any such reasonable leads and explanation have been exhausted or refuted, then you could consider this in determining whether the opening net worth alleged for each year included all of the defendant's assets. Obviously, improbable explanations would not be entitled to as much weight as any plausible and reasonable explanation. If you find that the government's investigation has failed to refute what seems to you to be plausible explanations furnished by the defendant or otherwise known to the government, then you may consider that in determining the validity of the opening net worth alleged for any year.
>
> If you find that the government has not established the defendant's opening net worth to a reasonable certainty as of the beginning of any year named in the indictment, then you must return a verdict of not guilty as to any such count.

(Tr. 1000-01). Significantly, Shang does not contend that the "investigation" portion of the Court's instruction or its greater net-worth instruction (which was five pages in length) incorrectly stated the law or misled the jury. It was indeed clear to the jury that a thorough investigation by the government was

necessary to convict. Hence, this claim is not a basis for relief.

There is similarly no merit to Shang's contention that the Court's admonition that it was up to the jury "to decide whether or not the government witnesses cranked in the right numbers" shifted the burden of proof. The following facts put the statement in context. Special agent James Tonna testified as the government's summary witness. He described the net-worth method of proof and the calculations upon which the government relied to show Shang had under-reported his taxable income. On direct examination, the government moved to introduce a chart as a summary exhibit that displayed its net-worth calculation for each of the five tax years Shang was charged with tax evasion. Shang objected. The following colloquy captures the exchange:

> Prosecutor: United States moves for the admission of government's exhibit 329, Your Honor.
>
> The Court: Any objection?
>
> Defense: Yes, Your honor, based upon the motion in liminae that I filed with the Court concerning the trust accounts and upon the Supreme Court decision in *United States versus Holland*, which deals with the issues that I won't – essentially, they're an inaccurate starting point, incomplete computation. I do object, Your Honor.
>
> The Court: All right. That objection is overruled for the reasons previously stated, and its going to be up to the jury to take into account whether or not the government has accurately utilized the net worth method.
>
> And I'm going to instruct the jury, and I will instruct you, ladies and gentlemen of the jury, at the end of the case on what the requirements

are for the net worth method. *Then it's going to be up to you to decide whether or not the government witnesses cranked in the right numbers and cranked out the right numbers and left anything out that makes a flaw in the government's analysis.* So you will in the end by the judge of whether or not this net worth method has been properly applied.

So the objection is overruled. Please proceed. Exhibit no. 3---

Prosecutor: -- 29.

The Court: --is now received in evidence.

(Tr. 673-74)(italics added).

This order rejects Shang's argument that the Court's statement shifted the burden of proof. The contrary is true. The statement properly reminded the jury of its duty to determine the credibility of the government's witnesses and resolved any evidentiary conflicts as to whether the government had met its burden under the net-worth method of proof. The Court's jury instructions later confirmed the instant admonition that the government carried the burden of proof as to

each element in this tax-evasion case. There was no error. 2

Shang also points to a number of purported acts of prosecutorial misconduct that he contends warrant a new trial. To prevail, he must show that the conduct more probably than not materially affected the fairness of the trial. *United States v. Smith*, 893 F.2d 1573, 1583 (9th Cir. 1990). Shang takes issue, to start, with a statement made by the government in its opening as to who had the burden of proving cash on hand in

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2 Shang claims that the Court also erred by denying his motion in liminae to exclude evidence of his attorney-client trust accounts from the net-worth computations and admitting into evidence various summary chart exhibits prepared by the government. Without further elaboration, Shang relies on the arguments he raised at trial. For the reasons adequately set forth on the record, both of these contentions are rejected (Tr. 643-53, 695-96, 618-20). Moreover, the Court's jury instructions on both of these issues cured any error, if there was any. See, e.g., *United States v. McCown*, 711 F.2d 1441, 1451 (9th Cir. 1983) (evidence of co-defendant's guilty plea was not error since jury was instructed to disregard it completely). The court properly instructed the jury that it could only consider the trust-account amounts as taxable to Shang if the government proved beyond a reasonable doubt that the accounts had been subject to Shang's unfettered control (Tr. 1003-04). By acquitting Shang of tax evasion for the 1995 and 1997 tax years, the jury necessarily found that the government had not met its burden (Tr. 746, 806-09). Similarly , the jury was properly instructed to reject the exhibits at issue if the charts and summaries failed to correctly reflect the evidence presented in the case (Tr. 990-91).

computing opening net worth.[3] No objection was made to the statement at trial. *See United States v. Atcheson*, 94 F.3d 1237, 1244 (9th Cir. 1996)(claim subject to review for plain error absent timely objection). If there was error, however, it was harmless. Neither side made much of the cash-on-hand issue at trial. Nonetheless, the Court made clear to the jury that "[a]t all times the burden rests on the government to establish an opening net worth with reasonable certainty" (Tr. 1000). The jury was indeed reminded on several occasions that "[t]he government has the burden of proving every element of each charge beyond a reasonable doubt" (Tr. 987, 997, 1002). There is no occasion for a new trial on this score.

Shang's other contentions fare no better. He argues a new trial is warranted where the government made two statements during closing argument that were not supported by the evidence. The first statement was that certain attorney-client trust accounts Shang had listed on a loan application would have been subject to execution in the event Shang had defaulted on the loan. The second statement involved a deprecation deduction for Shang's 35 foot yacht. Shang objected to both

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3. The government in its opening told the jury that:
He basically said during the course of his interview his parents were giving him gifts, but none were over $5,000. So he didn't receive any inheritances. There was no other sources the government was aware of. Under this method of proof, once the government has established what the opening net worth is, and we're going to establish that through the records that come in and through Mr. Tonna's testimony, the burden shifts to the defendant to come forward with evidence of any cash that he may have had at the beginning of net worth.

statements during the government's closing argument. The former argument, however, was squarely supported by evidence that Shang had exercised unfettered control over the subject trust accounts. As such, the argument fell well within the bounds of permissible argument granted the government. See *United States v. Cabrera*, 201 F.3d 1243, 1250 (9th Cir.2000). The jury was certainly free to reject the argument if it disagreed with the government. The statement concerning Shang's use of his yacht was offered by the government to explain where Shang had invested the cash he failed to declare. Since ability to pay taxes can be considered in determining whether he acted willfully, Shang's wealth and lifestyle were appropriate topics for comment during closing argument. *United States v. Poll* , 521 F.2d 329, 332-33 (9th Cir. 1975).

Finally, Shang argues that the government improperly implied during the direct examination of an IRS agent that Shang had been involved in a murder plot which was not charged in this case). The record, however, supports no such inference. In response to a question about Dr. Ronnie Monatlik,, a doctor with whom Shang had done business, the witness erroneously stated that Dr. Monatlik had closed his practice after having been shot in the head (Tr. 223). On cross-examination, however, the witness corrected himself, clarifying that Dr. Monatlik's office manager, rather than Dr. Monatlik, had been shot (Tr. 223-24). In any event, it was in no way implied that Shang (or Dr. Monatlik for that matter) had taken part in a murder conspiracy.

CONCLUSION

For the foregoing reasons, the evidence was adequate to sustain the verdict. All points raised by both of Shang's motions are without merit. The motions for acquittal and new trial are hereby **DENIED**.

IT IS SO ORDERED.

Dated: January 15, 2004 /s/ William Alsup
WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE